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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CHARLES T. ROBINSON,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

L. Chris Butler
P. O. Box 2463
4760 One Shell Plaza
Houston, Texas 77252
(713) 241-3027

Attorney for Respondent
Shell Oil Company

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QUESTIONS PRESENTED FOR REVIEW

1. Does Title VII § 704(a) of the Civil Rights Act of 1964 give former employees a cause of action for acts of retaliation allegedly occurring after the employment relationship has ended?

PARTIES TO THE PROCEEDING

1. Charles T. Robinson, Sr. (hereinafter referred to as "Robinson"), Plaintiff in the District Court and Petitioner.

2. Shell Oil Company[1] (hereinafter referred to as "Shell"), Defendant in the District Court and Respondent.

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[1] Shell Oil Company is wholly owned by Shell Petroleum Inc. Shell Petroleum Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum Company and 40% by the "Shell" Transport and Trading Company, p.l.c., which are publicly traded companies. Shell Oil Company has no subsidiaries which are less than wholly owned.

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CHARLES T. ROBINSON,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

_____

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

_____

This case involves the proper interpretation of a federal statute. Title VII § 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), declares it to be an unlawful employment practice for an employer to discriminate against "any of his employees or applicants for employment" because he has made a charge under Title VII. Does a person who is not an "employee or applicant for employment" have a cause of action under this statute against his former employer?

This case was filed in the United States District Court for the District of Maryland on January 4, 1993.[2] The District Court, Chief District Judge J. Frederick Motz presiding, granted a Motion to Dismiss on April 8, 1993, and entered an order dismissing the case. Robinson filed a Notice of Appeal on May 6, 1993.

On January 18, 1995, a panel of the United States Court of Appeals for the Fourth Circuit issued an Opinion reversing the judgment of the District Court and remanding the case for further proceedings.

On March 1, 1995, the Fourth Circuit granted Shell's Petition for Rehearing En Banc. On November 29, 1995, the Fourth Circuit issued an Opinion affirming the dismissal by the District Court.

In the Petition for Writ of Certiorari, Robinson argues that the term "employees" as used in § 704(a) is ambiguous and should be interpreted liberally to include former employees. The term "employee" is not ambiguous. The statute should not be given a strained construction to include former employees.

[2] The Complaint listed three individuals in addition to Shell as Defendants. However, Robinson did not appeal the dismissal as to these individuals.

CITATION OF OPINIONS

The Opinion of the United States Court of Appeals for the Fourth Circuit, sitting En Banc, issued on November 29, 1995, affirming the judgment in favor of Shell, is published at 70 F.3d 325.

The Opinion of the panel of the United States Court of Appeals for the Fourth Circuit, issued on January 18, 1995, reversing the judgment in favor of Shell and remanding the case, is unpublished. A copy is reprinted in the Appendix to the Petition for Writ of Certiorari.

The Opinion of the United States District Court for the District of Maryland, issued on April 8, 1993, is unpublished. A copy is reprinted in the Appendix to the Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction to consider the Petition for Writ of Certiorari under 28 U.S.C. § 1254(1).

APPLICABLE STATUTE

This case involves the proper interpretation of a federal statute, Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

A. THE CHARGE OF DISCRIMINATION

Robinson is a former Territory Sales Representative in Shell's Mid Atlantic Retail Marketing District. His employment was terminated effective October 13, 1991 under a severance program. Following termination of his employment, Robinson filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter referred to as the "E.E.O.C."). Robinson alleged that he had been fired on the basis of his race (Black).

The charge of discrimination resulted in a lawsuit, *Robinson v. Shell Oil Company*, Civil Action No. JFM 93-29 in the United States District Court for the District of Maryland. The suit was tried before the Court, Chief District Judge J. Frederick Motz presiding, in April 1994. At the conclusion of the trial, Judge Motz entered a judgment in favor of Shell. There was no evidence of race discrimination. Robinson did not appeal that judgment.

B. THE CHARGE OF RETALIATION

In February 1992, four months after he had been fired from Shell, Robinson applied for a job as an Insurance Account Representative with Metropolitan Life Insurance Company. On February 28, 1992, Metropolitan Life wrote a letter to Shell requesting information regarding Robinson's prior employment. Ross Fava, Sales Manager for Shell, completed a questionnaire in which he stated that Robinson did not leave Shell's employment voluntarily and that Shell would not re-employ Robinson. Fava rated Robinson as below average in nine employment categories. Robinson's attendance was rated as poor.

On March 10, 1992, Robinson filed a second charge with the E.E.O.C. This time Robinson alleged that Shell had given him a poor employment reference because he had previously filed a charge of discrimination against Shell. In other words, Robinson alleged that Shell had retaliated against him for filing his charge of discrimination in violation of the anti-retaliation provision of the Civil Rights Act of 1964, Title VII § 704(a), 42 U.S.C. § 2000e-3(a).

The charge of retaliation resulted in the present lawsuit.

1. PROCEEDINGS BEFORE THE DISTRICT COURT

On January 4, 1993, Robinson filed this suit in the United States District Court for the District of Maryland. This case was also assigned to Chief District Judge Motz. Robinson alleged that Shell had retaliated against him by "providing false information and negative job references to perspective (sic) employers."

On March 23, 1993, Shell filed a Motion to Dismiss in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure. Shell argued that Robinson was not employed by Shell at the time the employment reference was made and, therefore, § 704(a) did not apply.

Shell relied upon the case of *Polsby v. Chase*, 970 F.2d 1360 (4th Cir. 1992), *vacated sub nom. Polsby v. Shalala,* 113 S.Ct. 1940, in filing its Motion to Dismiss. The Fourth Circuit opinion in *Polsby* had only recently been issued on August 12, 1992. In *Polsby*, the Fourth Circuit held that the plain wording of § 704(a) stated that it applied to "employees or applicants for employment" and not to former employees.

On April 8, 1993, in reliance on *Polsby*, Chief District Judge Motz granted Shell's Motion to Dismiss and entered an order dismissing the case.

On April 26, 1993, the Supreme Court vacated the Fourth Circuit's judgment in *Polsby* and remanded the case "for further consideration in light of the position asserted by the Acting Solicitor General in his brief for the United States filed March 5, 1993." The Supreme Court did not address the merits of the Fourth Circuit opinion.

On May 6, 1993, Robinson filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit.

2. PROCEEDINGS BEFORE A PANEL OF THE FOURTH CIRCUIT

The appeal was argued before a panel comprised of Circuit Judges Hall, Hamilton, and Michael of the Fourth Circuit on September 28, 1994. On January 18, 1995, Judge Hall, writing for the majority of the panel, reversed the judgment of the District Court and remanded the case for further proceedings. Judge Hamilton filed a dissent.

On January 30, 1995, Shell filed a Petition for Rehearing and Suggestion for Rehearing En Banc. On March 1, 1995, the Fourth Circuit vacated the panel decision and granted the suggestion for rehearing en banc.

3. PROCEEDINGS BEFORE THE FOURTH CIRCUIT EN BANC

The appeal was reargued before the Fourth Circuit sitting en banc on September 26, 1995. On November 29,

1995, Judge Hamilton, writing for the majority of the Court, affirmed the judgment of the District Court. Judge Hall filed a dissent, as did Judge Murnaghan.

On February 27,1996, Robinson filed a Petition for Writ of Certiorari with the Supreme Court of the United States.

SUMMARY OF THE ARGUMENT

The plain wording of Title VII § 704(a) of the Civil Rights Act of 1964 protects "employees or applicants for employment" from retaliation by an employer for filing a charge of discrimination. This statute is clear and unambiguous. Under the well established rules of statutory construction, former employees are not protected by the Act. Exclusion of former employees is not contrary to any express intent of Congress. Exclusion of former employees is consistent with other provisions of Title VII. Therefore, the Fourth Circuit, sitting en banc, acted correctly in affirming the dismissal of this suit.

There is a split between the Courts of Appeals on the question of the application of § 704(a) to former employees.

The Petition for Writ of Certiorari should be denied. In the alternative, the Petition for Writ of Certiorari should be granted and the decision of the Fourth Circuit should be summarily affirmed.

ARGUMENT

1. Does Title VII § 704(a) of the Civil Rights Act of 1964 give former employees a cause of action for acts of retaliation allegedly occurring after the employment relationship has ended?

The Fourth Circuit determined that former employees were not protected against retaliation by § 704(a) by setting out the framework for statutory interpretation and then applying that framework to the statute. The Fourth Circuit also recognized other considerations that led to the conclusion that Congress did not intend to extend the coverage of § 704(a) to former employees. Finally, the Fourth Circuit examined the decisions of the other Courts of Appeals on this question.

The examination of this question by the Fourth Circuit was thorough and correct. The Supreme Court should deny the petition for writ of certiorari or summarily affirm the decision.

A. THE FOURTH CIRCUIT OPINION

1. THE RULES OF STATUTORY CONSTRUCTION

The Fourth Circuit recognized that any case involving the proper interpretation of a statute must begin by examining the statutory language. Words should be interpreted according to their common usage. Courts are not free to read into a law what is not there. *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

If a term is defined within a statute, that definition controls the meaning of the term whenever it appears in the statute. *Florida Department of Banking & Finance v. Board of Governors of the Federal Reserve System,* 800 F.2d 1534 (11th Cir. 1986).

If the statutory language is unambiguous and the statutory scheme is coherent and consistent, interpretation is unnecessary. The sole function of the court is to enforce the statute according to its terms. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989), *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

There are only two exceptions when a court may stray from the plain language of an unambiguous statute. The first is when literal application of the statute would lead to an absurd result. This exception applies only under rare and exceptional circumstances. The absurdity must be so gross as to shock the general moral or common sense and there must be something to make plain Congress' intent that the letter of the law should not prevail. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

The second exception is when literal application of the statutory language would produce a result demonstrably at odds with the intent of Congress. In such cases, the intention of the legislature, rather than the language of the statute, controls. However, this exception applies only when the contrary intent is clearly expressed by the legislative body. *Russello v. United States*, 464 U.S. 16, 20 (1983). In the absence of express Congressional intent, a court must assume that Congress intended to convey the language's ordinary meaning.

Of course, if the language of the statute is ambiguous, a court may look beyond the language to the legislative history for guidance in interpreting the statute.

2. APPLICATION OF THE RULES TO § 704(a)

(a) "Employee" is defined by 42 U.S.C. § 2000e(f).

The Fourth Circuit recognized that Title VII defines "employee" as "an individual employed by an employer." 42 U.S.C. § 2000e(f). This definition, therefore, controls the meaning of the term throughout the statute. Since Title VII does not define "employee" to include individuals who are *no longer employed* by an employer, a court must presume that Congress intended to exclude individuals who are no longer employed.

(b) The term "employee" does not include former employee in common usage.

There is nothing ambiguous in the phrase, "an individual employed by an employer." In common usage, an individual who is no longer employed by a company is never referred to as an "employee." Any individual, as well as any employer, knows immediately if he is presently employed. If an individual once worked at a company but does so no longer, he is referred to as a former employee or retiree. No former employee would mistakenly refer to himself as an "employee" of his former employer.

(c) There is nothing to indicate that Congress intended to include former employees within the protection of § 704(a).

Neither of the exceptions that will allow a court to stray from the plain language of an unambiguous statute are applicable to § 704(a). Both exceptions are dependent upon an express intent of Congress to include former employees within the protection of the Act. There is no such express Congressional intent.

Certainly, a literal interpretation of the statute would not lead to a result so absurd as to shock the general moral or common sense. Nor would a literal application produce a result demonstrably at odds with the intent of Congress. Title VII is not an all-purpose anti-discrimination statute. It is a narrowly drawn employment law. It protects two classes of persons against retaliation: employees and applicants for employment. Neither of these two classes would be affected by a refusal to expand the protection to a third class of former employees. Employees will still be able to sue employers for retaliation. Applicants for employment will still be able to sue prospective employers for retaliation.

3. OTHER CONSIDERATIONS

(a) Title VII forbids certain employment practices.

The Fourth Circuit noted that the type of practices forbidden by Title VII are particularly related to employment, not post-employment, relationships. Title VII prohibits "unlawful employment practice(s)." An unlawful employment practice is defined, in part, as the failure or refusal "to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Title VII protects individuals who are seeking employment or who are already employed. Title VII does not redress discriminatory practices which occur after the employment relationship has ended.

Title VII originally provided only equitable relief such as reinstatement, back pay, and injunctions against further violations. These equitable remedies were particularly suited to making a complainant whole without penalizing the employer. Congress did not intend to punish employers by imposing large monetary awards. In successful Title VII actions, an applicant will be hired; an employee will be promoted or reinstated to a job that was denied. However, it is much more difficult to fashion equitable relief for a former employee.

Since the remedies available under Title VII are not suited for post-employment events, those courts that have recognized a cause of action for former employees have been forced into hair-splitting decisions over what is "reasonably related to the employment." For example, the District of Columbia Circuit has held that the cancellation of a symposium in honor of a former employee could be an act of retaliation that stated a claim for relief under § 704(a).[3] However, the Third Circuit has held barring a former employee from the work place is not reasonably related to the employment so as to form a basis for retaliation under § 704(a).[4] Both decisions seem to be influenced by the ability of the court to fashion relief for the alleged harm.

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[3] *Passer v. American Chemical Society*, 935 F.2d 322, 331 (D.C. Cir. 1991).

[4] *Nelson v. Upsala College*, 51 F.3d 383 (3rd Cir. 1995).

Obviously, Title VII does not offer remedies that are easily adapted to post-employment retaliation claims. This is a strong indication that Congress did not intend to extend the protection of § 704(a) to occurrences after the employment relationship has ended.

(b) There is no "adverse employment action" after the employment relationship has ended.

The Fourth Circuit also noted that the second element of a *prima facie* case of retaliation requires that the employee suffer an "adverse employment action." This element necessarily demands that the adverse action occur during the employment relationship. An employer cannot control the employment of someone who no longer works for him. An employer cannot take an adverse employment action against that person.

4. THE DECISIONS OF OTHER COURTS OF APPEALS

The Fourth Circuit realized that its decision ran counter to the holding of several other Courts of Appeals. However, these contrary decisions were based on broad considerations of policy. Each of these decisions totally disregarded, without explanation, the established analytical framework for statutory construction.

In *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977), the Tenth Circuit stated merely that a literal reading of the statute would result in a narrow interpretation not justified by its legislative history. The court did not cite anything in the Congressional record regarding legislative history. Instead, the court noted that a remedial statute should be liberally construed. 565 F.2d at 1165.

The Second Circuit relied on *Rutherford* and held that a narrow construction would not give effect to the statute's purpose. *Pantchenko v. C.B. Dolge Company, Inc.*, 581 F.2d 1052, 1055 (2nd Cir. 1978).

The Eleventh Circuit also relied on the prior opinions by the Tenth and Second Circuits and held that a strict interpretation of the statute "would undercut the obvious remedial purposes of Title VII." *Bailey v. USX Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988).

The Third[5], D.C.[6], and Fifth Circuits[7] have made similar pronouncements in cases involving the identical anti-retaliation provision in the Age Discrimination in Employment Act, 29 U.S.C. § 623(d).

A court may not ignore the plain wording of an unambiguous statute based on its own interpretation of the policy behind the act.

B. THE PETITION FOR WRIT OF CERTIORARI

In his petition for writ of certiorari, Robinson attacks the opinion of the Fourth Circuit by noting that there is a split between Courts of Appeals on the correct interpretation of § 704(a). Robinson also argues that the term "employee" is ambiguous and could include a former employee. Finally,

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[5] *Charlton v. Paramus Board of Education*, 25 F.3d 194, 198-200 (3rd Cir. 1994).

[6] *Passer v. American Chemical Society, supra.*

[7] *EEOC v. Cosmair, Inc., L'Oreal Hair Care Division*, 821 F.2d 1085, 1088 (5th Cir. 1987).

Robinson argues a literal construction of the Act would defeat the purpose of the statute and lead to absurd results.

1. There is a split between Courts of Appeals on this question.

Robinson is correct in pointing out that there is a split between Courts of Appeals as to whether § 704(a) protects former employees from retaliation. The Fourth Circuit acknowledged this split in its decision. However, as discussed above, these contrary opinions totally disregard the established analytical framework for statutory construction.

Like these contrary opinions from other Courts of Appeals, Robinson ignores the analytical framework for statutory construction and bases his argument on his own interpretation of Congressional intent. Like the other Courts of Appeals, Robinson cites no authority for his assertion that exclusion of former employees from the protection of §704 (a) is contrary to the intent of Congress.

2. The term "employee" is not ambiguous.

An argument that § 704(a) is ambiguous is nothing more than wishful thinking. Robinson wishes that the language were ambiguous in order to more easily argue in support of an expansive interpretation.

Robinson cites no authority for his argument that "employee" is ambiguous other than the opinions of the Courts of Appeals contrary to the Fourth Circuit. These cases also cite no authority for this position. The Courts of Appeals have merely declared "employee" to be ambiguous in order to allow them to interpret the statute as they saw fit. This is *a priori* reasoning. Instead of examining the term "employee" according to its ordinary usage, the Courts of

Appeals have avoided analysis of the term in order to further their own belief as to the policy behind the Act.

No layman would confuse a former employee with a current employee. Individuals know if they are employed or not and, if so, by whom. It is absurd to suggest that it is unclear what Congress meant by prohibiting an employer from retaliating against "his employees."

The situation is analogous to arguing that the term "married" could refer to someone who is no longer married. Any individual knows if they are married or not. If an individual was married at one time but is no longer, he would referred to himself as single or separated or divorced, but never "married."

3. There is no express Congressional intent to include former employees within the protection of § 704(a).

Without acknowledging the rules of statutory construction or the exceptional circumstances under which a court may stray from the plain wording of an unambiguous act, Robinson argues that a literal construction of § 704(a) would defeat the purpose of the statute and lead to absurd results.

Robinson fails to recognize that these exceptional circumstances arise only when Congress has expressed an intent contrary to the plain wording of the Act. There is no express Congressional intent to include former employees within the protection of § 704(a).

An examination of the wording of § 704(a) would indicate that Congress did not intend to include former employees within its protection. Section 704(a) uses four

nouns to describe persons protected against retaliation: individual, member, applicant, and employee. The term "employee" is arguably the most restrictive.

Employment agencies and joint labor-management committees are prohibited from discriminating against any "individual." Labor organizations are prohibited from discriminating against any "member" or "applicant for membership." Employers are prohibited from discriminating against any of "his employees or applicants for employment."

Had Congress intended to prohibit discrimination by an employer against former employees, it could have easily included the term "former employee" along with "his employees or applicants for employment." Alternatively, Congress could have substituted the term "individual" for "his employees or applicants for employment."

This last suggestion is exactly what Congress has done in recent employment legislation. Both the Americans with Disabilities Act of 1990, 42 U.S.C. § 12203, and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2615, prohibit retaliation against any "individual." There is no question that these statutes would protect former employees from retaliation.

4. A literal construction of "employee" does not defeat the purpose of the statute.

Robinson offers several hypothetical examples in support of his argument that former employees should be able to sue their former employers. Most of these examples involve bad employment references by the former employer. Robinson argues that it would be unfair to allow the former employers to affect the ability of an individual to get a job. Robinson ignores the fact that § 704(a) does allow a cause of

action against a *prospective* employer for failure to hire an applicant because the applicant had previously filed a charge, participated in an investigation, etc.

Congress clearly intended to protect an applicant who is rejected for a job by providing for damages against the prospective employer only and not against the former employer even if the prospective employer learned of the protected activity from the former employer.

It is naive to think that an employer will not harbor some resentment against a former employee who accuses it of discrimination. It is also unrealistic to think that an employer will issue a favorable employment reference for a former employee who has accused it of discrimination. However, it may well be that Congress recognized that a former employee is sufficiently protected against false statements by the laws of defamation and that a former employee is not entitled to protection against a true statement, regardless of the motivation.

5. A broad construction of "employee" would contradict other provisions of Title VII.

Under 42 U.S.C.§ 2000e(b), Title VII applies to employers with "15 or more employees." Under Robinson's construction of the term "employee", Title VII would apply to any employer with 15 or more current or former employees. This would be a dramatic expansion of the Civil Rights Act of 1964.

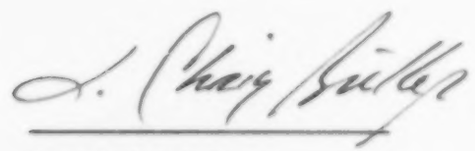
CONCLUSION

The wording of § 704(a) is clear and unambiguous. Former employees are not protected against retaliation under the Act. The opinion of the Fourth Circuit is correct.

The Petition for Writ of Certiorari should be denied.

In the alternative, the Petition for Writ of Certiorari should be granted and the decision of the Fourth Circuit should be summarily affirmed.

Respectfully submitted,



L. Chris Butler
P.O. Box 2463
4760 One Shell Plaza
Houston, Texas 77252
(713) 241-3027

Attorney for Respondent
Shell Oil Company